IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 9297 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

KARSANBHAI BIJALBHAI SADHIYA

Versus

STATE OF GUJARAT

Appearance:

MR BM MANGUKIYA for Petitioner

NOTICE SERVED for Respondent No. 1

Mr. U.R. Bhatt, AGP for Respondent No. 2, 3

CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 30/04/98

ORAL JUDGEMENT

By this application under Article 226 of the Constitution of India the brother of the detenu calls in question the legality and validity of the order of detention dated 12th November 1997, passed by the Police Commissioner for the city of Surat, invoking his powers under Section 3(2) of the Gujarat Prevention of Anti-Social Activities Act (for short, `the Act'), pursuant to which the detenu namely Varjangbhai alias

Kalio Bijalbhai has been arrested and at present kept under detention.

2. The Police Commissioner for the city of Surat had the information that the petitioner was the dangerous person because he was committing several offences in succession. He was thereby terrorising the people, putting the people in the instant fear of death or grievous hurt. He was considered to be the tartar because those who refused to bend his ways were brutally dealt with. He used to extort money using force and harass the people as a result of which tempo of public life was being disturbed considerably. The Police Commissioner then made detailed inquiry. After inquisition he could know that about three complaints were filed against the detenu, two complaints were filed with Varachha Road police station and one complaint was filed with Kapodra police station. The substance of all the complaints lodged is that the petitioner with the help of his compeers used to threaten the people with murder, or by force caused the persons to vacate lands, or showing revolver or using sword and other lethal weapon caused the people to succumb to his commands & unjust demands. Inquiry in details was necessary. The District Magistrate preferred to record the statements of some of the witnesses but no one was willing to give the statement because of the fear of violence and every one was worrying much about his safety. After considerable persuasion and when assurance was given that the particulars disclosing their identity would be kept secret some of the persons gave statements. Perusing the statements, the Police Commissioner found that subversive and nefarious activities of the detenu were going berserk and people were not feeling secured and stern action against the detenu was absolutely necessary so as to curb his anti-social activities. After cogitation he could realise that any action if taken under the general law would yield no result. The only way out was to pass the order of detention and detain the petitioner. In the result, the order came to be passed and the petitioner at present is kept under detention.

3. The order is challenged on several grounds but at the time of addressing the Court the petitioner's learned advocate tapered off his submissions confining to the only point namely exercise of privilege. According to him for not disclosing the source of the statements the privilege is unjustly exercised. No good cause was there to suppress the source. For want of the particulars the petitioner could not show how the statements were not reliable. His right to make effective representation was impaired making the detention illegal.

4. In reply to such contention, Mr. U.R. Bhatt, 4.
the learned APP submitted that after careful consideration of all relevant materials antecedents of the petitioner and other records that was placed before the detaining authority privilege was exercised because it was found that if the particulars about the witnesses if disclosed, possibility of retaliatory action from the petitioner could not be denied. Just to have the order of his choice the petitioner has approached this court. He therefore urged to dismiss the petition.

5. When both have confined to the only point namely
the exercise of privilege, it would be better if the law about non-disclosure of certain facts is elucidated. Reading Article 22(5) of the Constitution of India, what becomes clear is that the grounds on which order of detention is passed are required to be communicated to the detenu. The detenu is, therefore, required to be informed not merely factual inference and factual material which led to inference namely not to disclose certain facts but also the sources from which the factual material is gathered. The disclosure of sources can enable the detenu to draw the attention of the detaining authority in the course of his representation to the fact whether the factual material collected from such sources would be relied upon and used against him on the facts and circumstances of the case. Subject to the limitation mentioned in Article 22(6) of the Constitution of India and Section 9(2) of the Act, the detaining authority is of course empowered to withhold such facts and particulars, the disclosure of which he considers to be against the public interest. The privilege of non-disclosure has to be exercised sparingly and in those cases, where public interest dictating non-discosure overrides the public interest requiring disclosure. Hence the detaining authority must be fully satisfied on the basis of overall study that the apprehension expressed by the informant is honest, genuine and reasonable in the circumstances of the case. With a view to satisfy itself whether the fear of violence and consequential feelings of insecurity or apprehension of a wrong would be done to them at any time by the detenu by those making statement against the detenu is imaginary or fanciful; or an empty excuse or well-founded for disclosing or not disclosing certain facts or particulars of those persons, the authority making the order has to make necessary inquiry applying his mind. What can be deduced from such constitutional as well as legal scheme whereunder obligation to furnish the grounds and the duty to consider whether the disclosure of any facts involved

therein is against public interest are both vested in the detaining authority and not in any other. The authority passing the order of detention has to apply his mind and should itself be satisfied to the question whether or not the supply of the relevant particulars and materials would be injurious to the public interest. If the task of recording statements and necessary inquiry is entrusted to others, and if he mechanically endorses or accepts the recommendation of others or subordinate authority in that behalf without applying mind and taking his own decision, the exercise of power would be vitiated as arbitrary. What is further required is that the detaining authority must file his affidavit to satisfy the court that he had sincerely and honestly applied the mind for the bonafide exercise of the powers about disclosure and privilege regarding non-disclosure so that the court can examine rational connection between the ground disclosed or not disclosed in public interest. If no affidavit explaining the exercise of the power is filed, the court can infer against the detaining authority. If the affidavit is filed explaining the exercise of the power, the detenu may challenge the privilege exercised on the ground that the same is vitiated by factual or legal malafides. For my such view, a reference of a decision in the case of Bai Amina, W/o. Ibrahim Abdul Rahim Alla Vs. State of Gujarat and others- 22 G.L.R. 1186 held to be the good law by the Full Bench of this Court in the case of Chandrakant N. Patel Vs. State of Gujarat & Others 35(1) [1994(1)] G.L.R. 761, may be made.

6. In view of such law, the detaining authority was required to file the affidavit and satisfy the court that it was in the public interest namely to protect the lives of the witnesses certain particulars about those witnesses were required to be kept secret. It is pertinent to note that in this case affidavit justifying the circumstances for the exercise of the privilege under Section 9(2) of the Act is not filed. When that is so, it should be assumed that without any just cause the particulars were suppressed. As the particulars were not given, naturally the petitioner could not know what defence she could take, what were the reasons to state against them and whether in fact those witnesses really stated so or whether they were really in existence. Thus the right to make effective representation is jeopardised. Further, for want of explanatory affidavit, it can be said that there was no just cause for being personally satisfied applying the mind qua the privilege. Thus the requirements of Section 9(2) of the Act are not satisfied and the privilege exercised cannot be said to

be just and proper. The order of detention passed is, therefore, bad in law and continued detention is arbitrary and illegal. The same is therefore liable to be quashed.

7. For the aforesaid reasons, this petition is allowed. The order of detention dated 12-11-1997, is quashed and set aside being unconstitutional and illegal and the petitioner is ordered to be set at liberty forthwith if no longer required in any other case. Rule accordingly made absolute. D.S. permitted.

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(rmr).